Subject Index

	Page
Statement as to interest of amicus curiae	1
Summary of argument	5
Argument	6
Conclusion	17

Table of Authorities Cited

Cases	Pages
Barber v. Page, 390 U.S. 719 (1968)	8
Barker v. Wingo, 40 U.S.L. Week 4840 (1972)	12
Benton v. Maryland, 395 U.S. 784 (1969)	13
Commonwealth v. Gaito, 217 Pa. Super. 125, 268 A.2d 461 (1970)	6
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)	14
Douglas v. Alabama, 380 U.S. 415 (1965)	8
Dutton v. Evans, 400 U.S. 74 (1970)	8
Fay v. Noia, 372 U.S. 391 (1963)	16
Ferguson v. Georgia, 365 U.S. 570	8
Founts v. State, 483 P.2d 654 (Nev. Supreme Ct. 1971)	12
Gilday v. Commonwealth, 274 N.E.2d 589 (Mass. Sup. Jud. Ct. 1971)	6
Gori v. United States, 367 U.S. 364 (1961)	13
Griffin v. California, 380 U.S. 609 (1965)	13
Harrison v. United States, 392 U.S. 219 (1968)	11, 12
In re Gault, 387 U.S. 1 (1967)	7
In re Oliver, 333 U.S. 257 (1948)	7
Johns v. Perini, 440 F.2d 577 (6th Cir. 1971)	6
Klopfer v. North Carolina, 386 U.S. 213 (1967)	11

Pages

North Carolina v. Pearce, 395 U.S. 711 (1969) 17

Oyler v. Boles, 368 U.S. 448 (1962) 7

People v. Rakiec, 260 App. Div. 452, 23 N.Y.S. 2d 607 (1940) 8
Pointer v. Texas, 380 U.S. 400 (1965) 8
Price v. Georgia, 398 U.S. 323 (1970) 13

Rodriguez v. Superior Court, 9 Cal.App.3d 493, 88 Cal. Rptr. 154 (1970) 6

Smith v. Hooey, 393 U.S. 374 (1969) 11
Specht v. Patterson, 386 U.S. 605 (1967) 7
State v. Benner, 284 A.2d 91 (Maine Sup. Jud. Ct. 1971) 6
State v. Blake, 490 P.2d 1026 (Ore.App. 1971) 6
State v. Harris, 117 N.J. Super. 83, 283 A.2d 744 (1971).. 12
State v. Jenkins, 203 Kan. 354, 454 P.2d 496 (1969) 4
State v. Kelly, 203 Kan. 360, 454 P.2d 501 (1969) 4
State v. Nunn, 113 N.J. Super, 161, 273 A.2d 366 (1971).. 6
State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953) 12
State v. Stump, 119 N.W.2d 210 (Iowa Supreme Ct., 1963) 8
State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931) 8, 9

Ungar v. Sarafite, 376 U.S. 575 (1964) 8
United States v. Augenblick, 393 U.S. 348 (1969) 16
United States v. Ewell, 383 U.S. 116 (1966) 11
United States v. Jackson, 390 U.S. 570 (1968) 14
United States v. Jorn, 400 U.S. 470 13
United States v. Robel, 389 U.S. 258 (1967) 14

Washington v. Texas, 388 U.S. 14 (1967) 8, 16
Williams v. Florida, 399 U.S. 78 .....4, 5, 6, 10

Constitutions

United States Constitution:
Fifth Amendment 2, 13
Sixth Amendment 8, 11, 16
Fourteenth Amendment 2, 8, 13

Rules

Florida Rules of Criminal Procedure, Rule 1.200 8

Statutes

	Pages
Kansas General Statutes Annotated (1964):	
Section 60-1507	1
Section 62-1341	2, 3
22 Oklahoma Statutes (1961) Section 585	12
28 U.S.C., Section 2255	1

Texts

ABA Standards of Discovery and Procedure Before Trial, Supplement (Approved Draft, Oct., 1970) pp. 5-6	14
California Law Review, Comm., Recommendation and Study Relating to Notice of Alibi in Criminal Actions (1960)	10
Epstein, Advance Notice of Alibi, 55 J. Crim. L.C. & P.S. (1964) pp. 29-31	9, 10, 12
Federal Rules of Criminal Procedure 12 (2d Preliminary Draft 1944)	10
Proposed Rule 12A, Federal Rules of Criminal Procedure, 1962 Draft, 31 F.R.D. 673 (1963)	10
Millar, The Modernization of Criminal Procedure, J. Crim. L. (1920) pp. 344, 350	9
Oaks and Lehman, The Challenge of Crime in a Free Society (1967) pp. 128-29	15
Oaks and Lehman, The Criminal Process of Cook County and The Indigent Defendant, 1966, Univ. of Ill. L. Forum (1966) pp. 584, 693	15
15 Stanford L. Rev. (1963) pp. 700, 701, n. 7	12
Task Force Report: The Courts 32 (1967) Presidential Crime Commission's Task Force on the Administration of Justice	15
18 Tex.L.Rev., Is Specific Notice of the Defense of Alibi Desirable? (1946) p. 151	9, 12
Wormuth and Mirkin, The Doctrine of the Reasonable Alternative, 9 UtahL.Rev. (1964) p. 254	14

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-6042

RONALD DALE WARDIUS, *Petitioner*

VS.

STATE OF OREGON, *Respondent*

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE ON BEHALF OF VIRGIL JENKINS

STATEMENT AS TO INTEREST OF AMICUS CURIAE

Virgil Jenkins, on whose behalf this brief *amicus curiae* is filed, is currently serving a 50 year sentence in the state penitentiary at Lansing, Kansas, having been convicted of the crime of robbery. He filed in the District Court of Sedgewick County, Kansas a Motion to Vacate Sentence[1] on behalf of Mr. Jenkins

[1]Under Kansas procedure, a Motion to Vacate Sentence, which is filed pursuant to KANSAS GEN. STATS. ANN. § 60-1507, serves in lieu of a petition for habeas corpus as the manner by which a criminal conviction is collaterally attacked much as motions to vacate under 28 U.S.C. § 2255 serve in the federal courts.

asserting, *inter alia,* that his conviction was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution because of the invocation at his trial of the Kansas "alibi" statute, Section 62-1341 of the Annotated Statutes of Kansas. From the denial of that motion he has appealed to the Supreme Court of Kansas. That appeal is now pending.

Amicus was charged with participation in the robbery of a Wichita motel in the early hours of the morning on July 26, 1967. He was arrested later in the morning along with two other men; items found on their persons and in the car in which they were riding strongly suggested that all or some of them were participants in the robbery.

After the conclusion of the prosecution's case-in-chief, the defense at first indicated that it was not its intention to call any witnesses. Thereafter, counsel for the defense moved to reopen the case and called defendant Virgil Jenkins to the stand. He proceeded to testify that he was in a poolhall between the hours of midnight and approximately 3:00 A.M. on the night of the robbery, and thereafter was picked up by one of the two other men found in the car at the time of his arrest. The import of this testimony, of course, was that he could not have participated in the robbery because, at the time of its commission, he was somewhere else.

At this point, the prosecutor objected and moved that the defendant's entire testimony be stricken on

the ground that it constituted an alibi, and that no notice thereof had been given as required.[2] This ob-

---

[2]KANSAS GEN. STATS. ANN. § 62-1341 (1964) provides as follows:

In the trial of any criminal action in the District Court, where the complaint, indictment or information charges specifically the time and place of the offense alleged to have been committed, and the nature of the offense is such as necessitated the personal presence of the one who committed the offense, and the defendant proposes to offer evidence to the effect that he was at some other place at the time of the offense charged, he shall give notice in writing of that fact to the county attorney. The notice shall state where defendant contends he was at the time of the offense, and shall have endorsed thereon the names of witnesses which he proposes to use in support of such contention.

On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto now applicable to allowing the county attorney to endorse names of additional witnesses on an information. The notice shall be served on the county attorney as much as seven days before the action is called for trial, and a copy thereof, with proof of such service, filed with the clerk of the court: *Provided*, On due application and for good cause shown the court may permit the notice to be served at any time before the jury is sworn to try the action.

In the event the time and place of the offense are not specifically stated in the complaint, indictment or information, on application of defendant that the time and place be definitely stated in order to enable him to offer evidence in support of a contention that he was not present, and upon due notice thereof, the Court shall direct the county attorney either to amend the complaint or information by stating the time and place of the offense as accurately as possible, or to file a bill of particulars to the indictment or information so stating the time and place of the offense, and thereafter defendant shall give the notice above provided if he proposes to offer evidence to the effect that he was at some other place at the time of the offense charged.

Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the offense charged. In the event the time or place of the offense has not been specifically stated in the complaint, indictment or information, and the Court directs it be amended, or a bill of particulars filed, as above provided, and the county attorney advises the Court that he cannot safely do so on the facts as he has been informed

jection was sustained, and Mr. Jenkins' entire testimony was struck. On appeal, the Kansas Supreme Court upheld this ruling (*State v. Jenkins,* 203 Kan. 354, 454 P.2d 496 (1969), incorporating by reference the ruling in a companion case, *State v. Kelly,* 203 Kan. 360, 454 P.2d 501 (1969)).[3]

When this Court granted certiorari in *Williams v. Florida, amicus* filed a brief *amicus curiae* on the issue of whether an alibi-notice requirement is constitutional. The Court, expressly referring to that *amicus curiae* brief, reserved the very question now presented in this case:

> We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occa-

---

concerning them; or if in the progress of the trial the evidence discloses a time or place of the offense other than alleged, but within the period of the statute of limitations applicable to the offense and within the territorial jurisdiction of the Court, the action shall not abate or be discontinued for either of those reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the offense.

[3]No petition for certiorari was filed from that ruling, Mr. Jenkins' counsel being of the opinion that there might be some possible question as to whether the federal question was fully raised with respect to the alibi issue in the Kansas courts. For that reason, it was decided that a Motion to Vacate Sentence should first be brought in the trial court and, if relief should be denied by the state courts, to then seek certiorari in this Court. As earlier noted, Mr. Jenkins' appeal from the denial of his Motion to Vacate is now pending in the Supreme Court of Kansas.

sion to explore. Cf. brief for *amicus curiae,* 17-26. It is enough that no such penalty was exacted here.

(399 U.S., at 83 n. 14.)

Amicus fully agrees with Petitioner Wardius as to the unconstitutionality of the severe penalty imposed by Oregon (and by Kansas) upon a defendant who, perhaps through the inadvertence of his counsel, fails to give the requisite notice. The analysis presented here differs slightly from that of Petitioner. *Amicus'* submission stresses the availability of several alternative means for enforcing a requirement of advance notice of an alibi defense which are fully sufficient to protect the interests of the prosecution and the public which do not infringe, as does the sanction imposed by Oregon, the defendant's constitutional right to be heard.

SUMMARY OF ARGUMENT

Even if the prosecution may compel the defense to give advance notice of an alibi defense, it may not foreclose him from offering evidence of his innocence—from calling witnesses and from testifying on his own behalf—as the penalty for mere non-compliance with that requirement. The prosecution's legitimate interests may be adequately protected by other, less onerous, means (such as a continuance of the trial); to deny wholly the defendant the right to prove his innocence is a blatant denial of Due Process of Law.

ARGUMENT

This case presents for decision the constitutionality of a practice by which a defendant in a criminal case forfeits his right to offer evidence of his innocence (and, in some states including Oregon and Kansas, even to testify on his own behalf) if he has for any reason failed to give notice of his intention to present an "alibi" defense at his trial.

Since this Court's decision in *Williams,* several lower courts have expressed doubts as to the constitutionality of the sanction—preclusion of the defendant's evidence—commonly imposed. *Rodriguez v. Superior Court,* 9 Cal.App.3d 493, 88 Cal.Rptr. 154 (1970); *State v. Benner,* 284 A.2d 91, 98 (Maine Sup. Jud. Ct. 1971); *Gilday v. Commonwealth,* 274 N.E.2d 589, 592 (Mass. Sup. Jud. Ct. 1971) (given the constitutional problems presented by an alibi-notice rule, until those questions definitively resolved "defendants should not be ordered to identify alibi witnesses in advance of trial"); *cf. Johns v. Perini,* 440 F.2d 577 6th Cir. 1971).[4] For the reasons which follow,

---

[4]Other courts, to be sure, have been less troubled. In addition to the present case, see *State v. Nunn,* 113 N.J. Super. 161, 273 A.2d 366 (1971); *State v. Blake,* 490 P.2d 1026 (Ore.App. 1971); *Commonwealth v. Gaito,* 217 Pa. Super. 125, 268 A.2d 461 (1970). With all respect, the opinions in these cases, for the most part, wholly fail to recognize (as *Williams* clearly does, see 399 U.S., at 83 n. 14) that the issue of sanctions is wholly separate and distinct from the question which *was* resolved in *Williams* as to the permissibility of the alibi-notice requirement itself. Nor have any of these courts judged the constitutional permissibility of the sanction in the terms urged here—namely, whether there are not other equally effective remedies which do not deny the defendant the right to be heard and to offer evidence in his defense.

we think these constitutional concerns are well founded.[5]

The right to be heard in defense against criminal charges is anything but an exotic constitutional creation at the penumbra of contemporary jurisprudence. To the contrary, it is so fundamental that few would dispute its constitutional stature; a literally unbroken stream of decisions of this Court (paralleled, of course, by decisions of courts throughout this country) establish the root principle of Due Process that a defendant in a criminal case "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson,* 386 U.S. 605, 610 (1967); see also *In re Oliver,* 333 U.S. 257, 273-77 (1948) ("due process of law . . . requires that [the defendant] . . . have a reasonable opportunity to meet [the charges] by way of defense or explanation . . . and call witnesses in his behalf, either by way of defense or explanation"); *Oyler v. Boles,* 368 U.S. 448 (1962); *In re Gault,* 387 U.S. 1 (1967). The recent decisions of this Court specifically applying the various Sixth Amendment protections to State criminal proceedings establish that the accused cannot be deprived of the opportunity to cross-examine the witnesses against

---

[5]Although *Amicus* agrees with Petitioner that the lack of reciprocal discovery for the benefit of the defendant also invalidates the Oregon practice, our submission here is confined to the issue of sanctions.

him[6] and, more importantly for present purposes, neither may he be denied the right to compulsory process for obtaining witnesses whose testimony might be favorable. *Washington v. Texas,* 388 U.S. 14 (1967). Similarly, the defendant's right to effectively defend against the charges against him, and to offer evidence of his innocence, may not be indirectly infringed by an unreasonable denial of a continuance. *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964).

In sum, the Sixth and Fourteenth Amendments plainly assure the defendant in a criminal case (1) the right to call witnesses and present their testimony; *and* (2) the right to take the stand and to testify in his own behalf. See *Ferguson v. Georgia,* 365 U.S. 570, 598, 601 (concurring opinions).

These rights the State of Oregon denied to Petitioner Wardius, just as the State of Kansas denied *amicus* the opportunity of testifying at his own trial.[7]

We agree with Petitioner that no justification exists for the outright denial of the right to offer evidence and to testify personally on an issue which is not only relevant under the applicable law but is in fact potentially dispositive of the outcome of the case.

---

[6]E.g., *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Barber v. Page,* 390 U.S. 719 (1968); *Dutton v. Evans,* 400 U.S. 74 (1970).

[7]Some states, including Florida, would not bar the defendant from testifying even though no notice was given, but would bar other witnesses. E.g., FLA.R. CRIM. PRO. 1.200; *State v. Stump,* 119 N.W. 2d 210 (Iowa Supreme Ct., 1963); *State v. Thayer,* 124 Ohio St. 1, 176 N.E. 656 (1931); *People v. Rakiec,* 260 App. Div. 452, 23 N.Y.S. 2d 607 (1940). Neither Oregon nor Kansas is so generous.

But even if one were to accept that these most fundamental rights might be weighed against some overriding, compelling state interest, no such countervailing considerations are present to justify the application of so sweeping a denial of constitutional rights for mere non-compliance with a technical requirement of notice.

The purpose which alibi statutes or rules such as the one before the Court is intended to serve—avoidance of surprise and perjurious testimony—is itself unobjectionable.[8] Most of these provisions stem from proposals made a number of years ago (see Epstein, *Advance Notice of Alibi,* 55 J. CRIM. L.C. & P.S. 29-31 (1964), at a time when the federal Constitution had not been thought to impose much restraint upon state criminal proceedings. The proponents of the alibi-notice procedure contended that the cause of justice would be well served by requiring the accused to give advance notice to the prosecution of its intention to raise an alibi defense; the prosecution might then have an adequate opportunity to investigate the facts of the defense and develop evidence of its own which might disprove it. *E.g., State v. Thayer,* supra; Millar, *The Modernization of Criminal Procedure,* J. CRIM. L. 344, 350 (1920). Some doubt has been expressed as to the necessity and efficacy of the notice requirement,[9] and barely more than a quarter of the

---

[8] *Amicus* does not concede, of course, the constitutionality of the means by which the State seeks to achieve those goals by compelling the accused to give notice of alibi prior to trial.

[9] *See, e.g.,* Note, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX.L.REV. 151 (1946).

States have adopted it;[10] further, as will be seen, not all of them routinely deny the accused his right to offer evidence of a critical defense as the penalty for noncompliance, but rather attempt to enforce that policy of disclosure by other means. See note 12, infra, and accompanying text. Finally, although the alibi-notice requirement was sustained against constitutional attack in *Williams,* two Justices thought the requirement unconstitutional. See 399 U.S., at 106-116.

We advert to these matters not so much to suggest that this Court should reconsider *Williams,* but rather because they serve to remind us that the alibi-notice procedure is not grounded on considerations of grave necessity; and that it is not a practice universally supported by persons seriously concerned with the administration of justice. These considerations are relevant, we submit, to any determination as to whether a failure to give the requisite notice could ever justify the draconian penalty of precluding the defendant's evidence. To put the matter somewhat differently, it is proper to ask whether the limited (and much debated) benefits assertedly flow-

[10]Proposals for an alibi-notice requirement have recently been made but not accepted in California (see Calif. Law Rev. Comm., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS (1960)) and in the federal criminal system (see Proposed Rule 12A, FED.R.CRIM.PRO., 1962 Draft, 31 F.R.D. 673 (1963)); that was the second occasion on which an alibi-notice requirement was rejected for the federal criminal system, as this Court in 1944 struck two alternate alibi provisions from the then proposed Federal Rules of Criminal Procedure. Epstein, *Advance Notice of Alibi,* 55 J. Crim. L.C. & P.S. 29, 30 (1964). See FED.R. CRIM.PRO. 12 (2d Preliminary Draft 1944).

ing from the alibi-notice requirement might adequately be secured without depriving the defendant of his constitutional right to be heard and to offer evidence tending to establish his innocence. Such an examination, we submit, convincingly demonstrates that the goal of preventing unjustifiable acquittals because of the prosecution's ability to disprove perjurious alibi defenses can adequately be protected by means far less destructive of cherished constitutional guarantees. We consider some of them briefly:

(1) The trial court might punish the wilful disregard of an applicable rule of procedure by contempt—of either the accused, his counsel, or both. Assuming that the requirement of notice is itself constitutional, neither the defendant nor his counsel should be immune from the imposition of sanctions in the manner by which courts have traditionally protected their substantial interest in orderly procedure.

(2) The trial court might, where the prosecution has been surprised by the unannounced raising of an alibi defense, continue the trial for a reasonable period to allow the prosecution to make whatever investigation might be necessary to enable it to meet the defense.[11] In at least one state,[12] the trial court is

[11]The right of speedy trial, now a constitutional protection applicable to state criminal proceedings (*Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooey*, 393 U.S. 374 (1969)), would in no way be offended by a brief continuance for this purpose. The Sixth Amendment protects only against "undue and oppressive" delays (*United States v. Ewell*, 383 U.S. 116, 120 (1966)), and not against those which are justifiable and reasonable. *See, e.g., Har-*

empowered to continue the trial where an alibi defense is raised without prior notice, but does not have the power to exclude evidence of alibi. It is difficult to conceive of a situation in which the legitimate interests of the prosecution would not fully be protected by a continuance, the granting of which might even be made mandatory lest there be any doubt as to the willingness of trial judges to grant continuances in the circumstances.

(3) Should the defendant fail to give the required notice (and, again, assuming that the requirement is constitutional), that violation might be a proper basis for declaring a mistrial in circumstances (which, presumably, would be exceedingly rare) in which simply

---

rison v. United States, 392 U.S. 219 (1968). Thus this Court last Term adopted for speedy trial cases "a balancing approach in which the conduct of both the prosecution and the defendant are weighed." *Barker v. Wingo*, 40 U.S.L. Week 4840, 4845 (1972). There could be no reasonable basis for complaint where the defendant's own failure to comply with the statute or rule requiring notice was the occasion for granting a continuance.

[12]See OKLA. STAT., Tit. 22, § 585 (1961). Iowa has a similar statute, but there is judicial authority allowing exclusion of the alibi evidence. See *State v. Rourick*, 245 Iowa 319, 60 N.W.2d 529 (1953). Most states, but apparently not Kansas, at the least allow the trial judge discretion to allow the evidence and protect the interests of the prosecution by other means such as continuance. See Note, 15 STAN. L. REV. 700, 701 & n. 7 (1963); *Founts v. State*, 483 P.2d 654 (Nev. Supreme Ct. 1971) (trial court's refusal to exercise discretion to allow alibi evidence despite lack of notice held reversible error); *State v. Harris*, 117 N.J. Super. 83, 283 A.2d 744 (1971). Moreover, there is some evidence that even in those states which by statute absolutely bar alibi evidence where notice should have been but was not given, trial judges ameliorate the harshness of that provision by ignoring it. See Note, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX. L. REV. 151, 156 (1940); see Epstein, *Advance Notice of Alibi*, supra, at 36.

ordering a continuance would not be adequate to protect the legitimate interests of the prosecution.[13]

(4) The prosecutor might be allowed to argue to the jury, where the facts warrant, that the surprise assertion of an alibi defense (in violation of the requirement that he give advance notice) prejudiced the State's ability to deal with that defense and, accordingly, that the alibi defense must be viewed critically in view of the circumstances.[14] Similarly, an instruction to that effect from the trial judge might be in order.

These remedies and sanctions are fully adequate to protect the interests of the prosecution and public. Thus the American Bar Association was able to con-

---

[13] While the ordering of a mistrial could in theory give rise to a claim that a retrial would constitute jeopardy in violation of the Fifth Amendment (*Benton v. Maryland*, 395 U.S. 784 (1969)); (*Price v. Georgia*, 398 U.S. 323 (1970)), such a contention would seem ill founded. See *Gori v. United States*, 367 U.S. 364 (1961). Such a case would not involve any of the factors which might render a retrial following a mistrial as a violation of the double jeopardy clause, such as a mistrial ordered because of wrongful conduct on behalf of the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." (*Gori v. United States*, supra, at 369). To the contrary, our hypothetical mistrial would be the response to the *defendant's* failure to comply with the requirement that he give advance noice of an alibi defense, in the rare case where no other remedy would suffice. *Cf. United States v. Jorn*, 400 U.S. 470, 486 ("[A]n important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process"). Particularly when viewed as an alternative to the far harsher procedure presently practiced—exclusion of the defendant's alibi evidence altogether—such an order could not be considered a denial of due process.

[14] Such a comment would not violate the rule of *Griffin v. California*, 380 U.S. 609 (1965) assuming that the alibi-notice requirement itself violate the Fifth and Fourteenth Amendments.

clude that the sanctions for non-compliance with an alibi-notice requirement should *not* include the denial of the right to offer evidence. ABA STANDARDS OF DISCOVERY AND PROCEDURE BEFORE TRIAL, Supplement (Approved Draft, October, 1970), at pp. 5-6.

Given the settled principle that constitutional rights may not be infringed—even where the ends be legitimate—when there are available alternative means less destructive of constitutional rights (*e.g., United States v. Jackson,* 390 U.S. 570, 582-83 (1968); *United States v. Robel,* 389 U.S. 258 (1967); *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354-56 (1951); see generally Wormuth and Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L.REV. 254 (1964)), there is no possible basis for sustaining the sanction imposed upon Petitioner. The various alternatives discussed above—which may well be considerably short of exhaustive—would, singly or in combination, provide full protection for the legitimate interests of the prosecution which are said to be the basis for the alibi-notice requirement. There is, plainly and simply, no possible justification for a sanction which wholly denies the defendant all opportunity to be heard on a vital aspect of his defense. The rule which denies a defendant the right to be heard is fundamentally arbitrary, viciously choking off the defense as a penalty for what is at most a procedural omission.

The unfairness of that approach is particularly apparent when viewed against the background of the realities of criminal law administration in this coun-

try. A substantial number of defendants in criminal cases are indigent or nearly so. They may be represented by court appointed counsel, a Public Defender, or one of the attorneys whose office is the local criminal court and whose practice is operated, as the recent Presidential Crime Commission's Task Force on the Administration of Justice phrased it, on "a mass production basis." TASK FORCE REPORT: THE COURTS 32 (1967). Frequently, counsel will have had little or no opportunity to study the case much in advance of trial; it is not uncommon for client and counsel to meet just before the trial.[15] Inadvertence or the errors of counsel may account for a substantial proportion of the instances in which the required notice is not given and the alibi defense thereby lost forever; but it is the defendant, not his lawyer, who must pay the price. Thus a penalty—the loss of the right to present an alibi defense—which would be unfair even as to a defendant who deliberately concealed his intention to present an alibi defense is also indiscriminately applied to the non-wilful defendant

---

[15] *See, e.g.*, Oaks and Lehman, *The Criminal Process of Cook County* and *The Indigent Defendant*, 1966, UNIV. OF ILL. L. FORUM, 584, 693 (1966); THE CHALLENGE OF CRIME IN A FREE SOCIETY, 128-29 (1967):

> In many lower courts defense counsel do not regularly appear, and counsel is either not provided to a defendant who has no funds; or, if counsel is appointed, he is not compensated. The Commission has seen, in the "bullpens" where lower court defendants often await trial, defense attorneys demanding from a potential client the loose change in his pockets or the watch on his wrist as a condition of representing him. Attorneys of this kind operate on a mass production basis, relying on pleas of guilty to dispose of their caseload. They tend to be unprepared and to make little effort to protect their clients' interests.

who, perhaps through the blunders of counsel or due to his late entry into the case, fails to give the required notice.[16]

For these reasons, we think it manifest that the total preclusion of a defendant's evidence of alibi—including his own testimony—may never be permitted, and that as a matter of law the general availability of effective means for enforcing an alibi-notice requirement confirm the unconstitutionality of such a sanction.

At the very minimum, however, no such sanction can be permitted unless (1) it appears, *on the record,* that the defendant's failure to give notice was wilful; and (2) that in the particular circumstances of the case no other means of protecting the prosecution's legitimate interests—such as a continuance or the other techniques discussed above—will suffice. The first of these requirements follows from the settled principle that constitutional rights may not be lost through inadvertence, but only through knowing, intelligent and deliberate waiver. *E.g., Fay v. Noia,* 372 U.S. 391, 439 (1963). The second requirement, of

[16]This case involves the baldest of infringements of the right of an accused to be heard and to present evidence. Recognition of the unconstitutionality of that infringement surely does not imply that a federal question would be presented by the even-handed application of traditional rules of evidence as to admissibility, any more than the application of the Sixth Amendment right of confrontation to state criminal proceedings (see authorities cited note 15, supra) has superseded state hearsay rules with a federal evidence code (*cf. United States v. Augenblick,* 393 U.S. 348, 355-56 (1969)), or the right to compulsory service of process supersedes "nonarbitrary state rules" regarding the capacity of a witness to testify. *Washington v. Texas,* 388 U.S. 14, 23 n. 21; see also *id.,* at 24-25 (Harlan, J., concurring).

course, is the narrowest conceivable application of the less-burdensome alternative principle discussed above. This is not unlike the approach taken in *North Carolina v. Pearce,* 395 U.S. 711 (1969), where the Court held that a greater sentence may not be imposed upon a defendant who had successfully appealed his original conviction and had been convicted on retrial unless "the reasons [therefor] affirmatively appear . . . [on] the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (*Id.,* at 726). Patently, the State of Oregon has not made this showing here.

CONCLUSION

A defendant in a criminal case may not be deprived of his constitutional right to be heard and to present relevant evidence tending to establish his innocence for mere non-compliance with the notice requirement; the prosecution's legitimate interests may adequately be protected by means far less subversive of the defendant's right to offer relevant defensive evidence and to testify at his own trial. For this reason, the judgment of the court below should be reversed.

Dated: July 27, 1972.

Respectfully submitted,
JEROME B. FALK, JR.,
Attorney for Amicus Curiae,
Virgil Jenkins.